No. 89-152

IN THE

Supreme Court of the United States

October Term, 1989

VERA ENGLISH,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Legislative History

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE

Plaintiff Employment Lawyers Association (hereafter PELA) is a non-profit organization consisting of over 800 lawyers in forty-nine states. PELA's members concentrate in the representation of individual employees in employment and labor matters. Members of PELA are active in litigating abusive employee discharge claims like that of Petitioner throughout the nation. PELA is vitally interested in the outcome of this critical case. Amicus has obtained the consent of both the Petitioner and Respondent to file this brief, and has filed letters indicating consent with the clerk's office.

STATEMENT OF THE CASE

PELA adopts the statement of the case as presented by Petitioner.

ISSUE

Whether The Energy Reorganization Act, 42 U.S.C. 5851, Which Provides A Limited Remedy For Employees Who Suffer Reprisal For Making Safety Complaints (Whistleblowing), Preempts An Employee's State Law Tort Action?

SUMMARY OF ARGUMENT

There is no Congressional intent suggesting that 42 U.S.C. 5851 was designed to preempt all preexisting state tort law claims available to redress various forms of abusive employer misconduct. North Carolina and other states have long provided an independent judiciary affording employees traditional remedies and constitutionally protected rights of trial by jury. Absent clear Congressional intent to preempt state law claims, a federal statute may not eviscerate preexisting state remedies for intentionally inflicted emotional distress. Here, the Fourth Circuit's approach preempting such a traditional state tort remedy contravenes basic principles of American federalism.

I. The Energy Reorganization Act, 42 U.S.C. 5851, Does Not Preempt a State Tort Claim Arising Out of an Unlawful Employee Discharge for Making Safety Complaints.

Absent an express Congressional intent to preempt state law, preemption occurs when "compliance with both is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1942). The analysis in *Norris v. Lumberman's Mutual Casualty Co.*, 881 F. 2d 1144, 1150 (1st Cir. 1989) demonstrates that neither the statutory language nor the legislative history of section 5851 indicates any Congressional intent to prohibit state common law remedies. *Lingle v. Norge Division of Magic Chief*, 108 S. Ct. 1877, 1885 (1988) rejected the analysis employed by the lower court here favoring preemption. *Accord Fort Halifax Packing Company v. Coyne*, 482 U.S. 1 (1987) (State statute requiring severance pay not preempted by NLRA or ERISA).

Preemption analysis begins with the settled concept that all presumptions operate against preemption. *E.g. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Preemption analysis provides that one "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As Chief Justice Rehnquist has explained, "unless the requisite preemption intent is abundantly clear, we should hesitate to invalidate state and local legislation..." *City of Burbank v. Lockhead Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J. dissenting). The Fourth Circuit's approach in the case *sub judice* overlooks these strong presumptions and the legislative history of section 5851. *See* S. Rep. No. 848, 95th Cong., 2nd Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7303; *Gaballah v. PG&E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989); *Wheeler v. Caterpillar Tractor Co.*, 485 N.E. 2d 372 (Ill. 1985), *cert. denied*, 475 U.S. 1122 (1986). Here, there is no such abundantly clear evidence that Congress intended to preempt the entire field of all state remedies for emotional harm and other tortious injuries to workers who suffer reprisal for making safety complaints.

These fundamental principles of deference to state law have been particularly strong where the state law involved is common law rather than statutory law. In *Nader v. Allegheny Airlines*, 426 U.S. 290, 301 (1976), this Court rejected the defendant's preemption argument, reaffirming that common law rights are not abrogated by a subsequent federal statute. This Court has long preserved states' rights to enforce common law remedies, especially in the labor context. E.g., *Belknap v. Hale*, 463 U.S. 491, 509 (1983) (state fraud and contract claims not preempted by the National Labor Relations Act); *Linn v. Plant Gaurd Workers*, 383 U.S. 53, 63 (1966) ("state remedies have been designed to compensate the victim...").

This Court's holding and rationale in *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977) is controlling. There, this Court held that the National Labor Relations Act did not preempt a tort action for intentional infliction under California law. Absent express legislative intent to preempt a specific area by statute, statutory and common law remedies are cumulative. See *New York Tel. Co. v. New State Dept. of Labor*, 440 U.S. 519 (1979); *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292 (Ore. 1984); J. Sutherland, *Statutory Construction*, section 50.05 at 441 (4th ed. 1984). Therefore, the long established North Carolina common law doctrines of intentional infliction of emotional distress and wrongful discharge are similarly not abrogated by the subsequently enacted limited remedy associated with 42 U.S.C. 5851.

Congress and the states have enacted overlapping protections against wrongful discharge and related injuries thus creating layers of essential protection. *See* McGuinness, *The Doctrine of Wrongful Discharge In North Carolina: The Confusing Path From Sides to Guy and the Need for Reform*, 10 Campbell L. Rev. 217, 219 n.4 (1988) (summarizing federal statutory and state common law theories of recovery). There is no actual or apparent conflict between the essential purposes of North Carolina's state tort law and section 5851 and thus no obstacle for compliance with both. Moreover, "ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989). In *Decanas v. Bica*, 424 U.S. 351, 356 (1976), this Court recognized that "states possess broad authority...to regulate the employment relationship to protect workers within the State."

The Fourth Circuit's approach here frustrates the bedrock principles of federalism.

This Court has repeatedly "recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985). Justice Marshall's concurrence in *Loudermill* also underscored the "traumatic effect of a wrongful discharge on a working person" and how "so very much is at stake" in employment litigation. *Id.* at 551. Too much is at stake in state employment litigation nationally for section 5851 to wipe out centuries of settled state common law protection absent clear Congressional intent to displace these seminal laws. The Fourth Circuit's approach in the case *sub judice* erroneously construes Congressional intent and frustrates settled state law protection for the common worker. As one commentator explained:

> In the workplace, we wage our most important battles, with poor weapons and few rights, and then, like the slaves of old, many are irretrievably trapped...The American worker...lives with degradation and helplessness. G. Spence, *With Justice For None* 162 (1989).

II. The Decision Below Preempting Petitioner's State Law Claim Frustrates The Independence Of North Carolina Jurisprudence And The North Carolina Constitution.

A. North Carolina's Tradition Of Affording Protection Against Abusive Employee Discharge Militates Against Preemption.

Are the states free to provide greater or additional remedies for abused workers than the limited remedies provided by Congress through 42 U.S.C. 5851? *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989) and its antecedents provide that states are free to "impose liability over and above that authorized by federal law." The foregoing preemption analysis must be applied against

the backdrop of North Carolina's historic tradition of state law protection for the abused worker.

North Carolina has a rich and proud heritage of protecting employees from abusive employer misconduct through various common law claims. North Carolina was among the first states in the nation to recognize a bad faith exception to the employment at will doctrine. In 1874, in *Haskins v. Royster*, 70 N.C. 601 (N.C. 1874), the North Carolina Supreme Court held that an employer may not discharge an employee in bad faith. See McGuinness, *The Doctrine of Wrongful Discharge In North Carolina: The Confusing Path From Sides To Guy and The Need For Reform*, 10 Campbell L. Rev. 217, 222-23 (1988). In the nineteenth century, the North Carolina Supreme Court observed that "the courts will be very delelict in their duty if they do not force justice in favor of employees as well as the public." *Greenlee v. Southern Railway*, 30 S.E. 115, 115 (N.C. 1898).

In *Coman v. Thomas Manufacturing Company*, 381 S.E. 2d 445 (N.C. 1989), the North Carolina Supreme Court reaffirmed *Haskins*: "bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Id.* at 448 and n.3. Judge Richard Posner of the Seventh Circuit similarly supports a state law cause of action for wrongful discharge. "A common law tort of unjust termination [is] sensibly applied in cases where a worker is fired for exercising a legal right..." Posner, *The Economic Analysis of Law* 307 (3rd ed. 1986). *See Lingle v. Norge Div. of Magic Chief, Inc.*, 108 S. Ct. 1877, 1881-82 (1988) (discussing state wrongful discharge claims in the context of preemption).

Between North Carolina's historic pronouncements in *Haskins* and *Coman*, the North Carolina Court of Appeals employed its common law tradition in recognizing various common law theories to enable workers to combat abusive employer conduct. E.g., *Sides v. Duke Hospital*, 328 S.E. 2d 818, *disc. rev. denied*, 333 S.E. 2d 490 (N.C. 1985) (public policy exception to the at will doctrine); *Williams v. Hillhaven Corp.*, 370 S.E. 2d 423 (N.C. App. 1988) (same). In *Sides*, the court relied upon North Carolina's rich common law history: "with social change comes the imperative demand that law shall satisfy the needs which change has created...law shall at once have continuity with the past and adaptability to the future." 328 S.E. 2d at 827, quoting Stone, *The Common Law In The United States*, 50 Harv. L. Rev. 4, 11 (1936).

In addition to the traditional bad faith exception and the public policy exception, North Carolina also recognizes implied contract claims for discharged employees. *Trought v. Richardson*, 338 S.E. 2d 617, 619-20 (N.C. App. 1986) (bilaterally executed employment manual binding). In addition to the numerous federal statutory and constitutional protections, the North Carolina General Assembly has afforded protection for whistleblowers. See N.C. Gen. Stat. 126-84. The Fourth Circuit's decision eviscerates the fabric of this compelling state protection of basic human rights.

B. North Carolina's Recognition Of Intentional Infliction Of Emotional Distress Militates Against Preemption.

In addition to the traditional wrongful discharge theories, North Carolina has also long recognized the tort of intentional infliction of emotional distress. See *West v. Kings Department Store, Inc.*, 365 S.E. 2d 621 (N.C. 1988); McGuinness, *Contemporary Applications of Intentional Infliction of Emotional Distress*, Journal of The North Carolina Academy of Trial Lawyers 20 (Vol. 21, No. 1, 1989). In *Kirby v. Jules Chain Stores Corp.*, 188 S.E. 625 (N.C. 1936), the North Carolina Supreme Court initially recognized a form of intentional infliction of emotional distress as an independent tort. *See generally* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939).

Contemporary North Carolina cases have also applied the intentional infliction tort to various forms of abusive employee discharge. In *Hogan v. Forsyth County Country Club*, 340 S.E. 2d 116, 123 (N.C. App. 1986), *disc. rev. denied*, 346 S.E. 2d 141 (1986), the court recognized intentional infliction in an employee discharge case premised upon sexual harassment. In spite of the comprehensive coverage and application of Title VII of the Civil Rights Act of 1964, North Carolina recognized the protection of the intentional infliction tort and the essential "remedial recourse through our North Carolina legal system." *Id. See Johnson v. Railway Express*, 421 U.S. 454, 459 (1975) (despite the comprehensive nature of Title VII, "the aggrieved individual is clearly not deprived of other remedies he possesses and is not limited to Title VII in his search for relief"). Certainly, if the pervasive Title VII scheme does not preempt the field, the narrow provision in section 5851 is not preemptive.

In *Dixon v. Stuart*, 354 S.E. 2d 757 (N.C. App. 1987), the court reversed the trial court's dismissal of the employee's intentional infliction claim where the employee alleged a pattern of ridicule and egregious harassment in the workplace. *See Brown v. Burlington Industries* 378 S.E. 2d 232 (N.C. App. 1989) (intentional infliction verdict of $60,000.00 affirmed in employee discharge case premised upon sex harassment). These compelling North Carolina cases are in accord with strong national trends underscoring traditional state law intentional infliction claims. E.g. *Davis v. U.S. Steel*, 779 F. 2d 209 (4th Cir. 1985) (sex harassment); *Pratt v. Brown*, 855 F. 2d 1225 (6th Cir. 1988); *Rogers v. Loews L'Enfant Plaza*, 526 F. Supp. 523 (D.D.C. 1981); H. Perritt, *Employee Dismissal Law and Practice*, section 5.23 (2nd ed. 1987); Larson & Barowsky, *Unjust Dismissal*, section 4.03 (1986).

C. Intentional Infliction Broadly Applies To A Comprehensive Range Of Abusive Employer Misconduct.

In addition to the foregoing employee discharge cases grounded in intentional infliction theories, the intentional infliction tort has been employed in various other employment contexts. E.g., *Holmes v. Oxford Chemicals*, 672 F. 2d 854 (11th Cir. 1982) (intentional infliction verdict upheld where the employer arbitrarily reduced employee's monthly disability payment); *Kelly v. Schlumberger Tech.*, 849 F. 2d 41 (1st Cir. 1988) (intentional infliction claim recognized for employer misconduct in drug testing program; $125,000.00 verdict affirmed); *Southwest Forest Ind. v. Sutton*, 868 F. 2d 352 (10th Cir. 1989) (intentional infliction verdict of $1,250,000.00 upheld for abusive discharge); *Collins v. General Time Corp.*, 549 F. Supp. 770 (N.D. Ala. 1982) (threats of discharge may give rise to intentional infliction); *Geist v. Martin*, 675 F. 2d 859 (7th Cir. 1982) (intentional infliction for termination of plaintiff's husband as agent of defendant); *Hall v. May Dept. Stores*, 637 P. 2d 126 (Ore. 1981) (intentional infliction claim supported for employee harassment in investigating cash shortages). In *Milton v. Ill. Bell Tel.*, 427 N.E. 2d 829 (Ill. App. 1981), the court held that an intentional infliction claim was stated where the employer harassed the employee for refusing to falsify reports. The intentional infliction tort also applies far beyond the employment context, often focusing on a series or pattern of bad

acts. E.g., *Woodruff v. Miller*, 387 S.E. 2d 176 (N.C. App. 1983); *Muratore v. MLS Scotia Prince*, 656 F. Supp. 471 (D. Me. 1987), *aff'd* 845 F. 2d 347, 352 (1st Cir. 1988).

The import of the foregoing cases is that states are free to employ their common law tradition in recognizing multiple layers of protection from abusive employer misconduct, thus affording full damage remedies along with the right to trial by jury. Since there is no conflict in the state and federal provisions, there is no legitimate basis to abrogate time-honored state law. The Fourth Circuit's holding in the case *sub judice* denies Vera English and employees everywhere their fundamental right to trial by jury as guaranteed by the North Carolina and United States Constitutions.

D. North Carolina's Independent Judiciary Affords An Essential Forum For Employee Protection.

North Carolina employees such as Vera English are entitled to access state courts for traditional remedies pursuant to Article I, Section 18 (Open Court Clause) of the North Carolina Constitution. The Open Court Clause provides: "All courts shall be open; every person for an injury done him in his lands, good, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." The reasoning of the North Carolina Supreme Court in *Coman* is especially instructive: "Although plaintiff may have some additional remedy in the federal courts, the courts of North Carolina cannot fail to provide a forum to determine a valid cause of action." 381 S.E. 2d at 446. Article 1, Section 1 of the North Carolina Constitution further endows individuals with a constitutional right to enjoy the fruits of one's labor. *See Treants v. Onslow County*, 350 S.E. 2d 365 (N.C. App.), *aff'd* 360 S.E. 2d 783 (1987).

States are free to provide greater remedies than those afforded by Congress or by the federal constitution. In *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980), this Court recognized the authority of a state "to adopt in its own constitution individual liberties more expansive than those conferred by the federal constitution." *Accord Oregon v. Hass*, 420 U.S. 714, 719 (1975); see *Cooper v. California*, 386 U.S. 58, 62 (1967). More specifically, in *Silkwood v. Kerr-McGee*, 464 U.S. 238, 257-58

(1984), this Court held that states are free to impose greater liability on offending employers tnat Congress has seen fit to impose. Here, the Fourth Circuit's decision pervasively tramples upon traditional states' rights without any supporting Congressional intent. Rather, the decision below serves only to frustrate North Carolina's history of providing redress to employees subjected to tortious emotional distress by abusive employers.

CONCLUSION

Wherefore, Amicus PELA respectfully urges this Court to reverse the judgement below and to remand this case for trial.

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